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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RODNEY H. MEDEIROS et al., Plaintiffs and Respondents, v. LESLIE A. JOHNSON et al., Defendants and Appellants.	A107139 (Alameda County Super. Ct. No. RG03079383)
RODNEY H. MEDEIROS et al., Plaintiffs and Appellants, v. LESLIE A. JOHNSON et al., Defendants and Respondents.	A107372, A107373

These consolidated appeals arise out of a legal malpractice action filed by Rodney and Gertrude Medeiros (plaintiffs) against Miller, Starr & Regalia and one of its attorneys, Leslie Johnson (defendants). Defendants provided legal services to plaintiffs and their real estate broker in connection with a 1991 sale-leaseback transaction in which plaintiffs purchased a Kmart store but not the underlying land. Plaintiffs claim Johnson failed to advise them they would be personally liable for payments due under a ground sublease if Kmart defaulted on its obligations. A jury found by special verdict that Johnson had not been negligent in the performance of legal services for plaintiffs, and the trial court entered judgment for defendants.

Plaintiffs appeal from the judgment, contending the trial court erred by ruling that their real estate broker was their agent for purposes of dealing with defendants. They also argue that the trial court committed prejudicial error when it purportedly instructed the jury to impute the broker's negligence to them and to consider whether they read the contract documents before signing them. Plaintiffs further claim that the trial court erred by excluding certain evidence at trial and by granting a nonsuit for the broker in a cross-claim filed by defendants. In a separate appeal from an order after trial, plaintiffs contend the trial court abused its discretion by denying in part their motion to tax costs. Defendants filed a separate appeal from a postjudgment order denying their motion for an award of attorney fees.

We affirm the judgment and the two postjudgment orders that are the subject of these appeals.

FACTUAL AND PROCEDURAL HISTORY

In 1983, Rodney Medeiros inherited a parcel of real estate in Hawaii. At the urging of his cousin, who owned an adjacent parcel, he chose to sell the Hawaii property in 1990. The sale generated net proceeds of approximately $3,170,000. With the aid of a real estate agent, he sought to acquire like-kind property in California for the purpose of effecting a tax-deferred exchange of the Hawaii property under section 1031 of the Internal Revenue Code. Plaintiffs Rodney and Gertrude Medeiros, a married couple, had 180 days to complete acquisition of replacement property after the close of escrow on the Hawaii property to qualify for tax-deferred treatment.

Robert Chee, a San Francisco real estate agent, showed plaintiffs several potential replacement properties, including a multi-unit apartment complex located in the Pacific Heights neighborhood of San Francisco (the Pacific Heights property). The Pacific Heights property was offered at $4.65 million. Plaintiffs claim to have entered into escrow to purchase the Pacific Heights property, although they never applied for a loan to complete the transaction.

Before committing to purchase the Pacific Heights property, plaintiffs contacted their long-time friend Louis Rosenaur, a real estate broker, to obtain a second opinion

about where to invest the proceeds from the Hawaii sale. Rosenaur inspected the Pacific Heights property and advised against purchasing it. Instead, he recommended that plaintiffs consider purchasing a Kmart store in Lake Elsinore, California (the Kmart property), in a triple net sale-leaseback transaction. Ultimately, based on Rosenaur's recommendation, plaintiffs selected the Kmart property as the section 1031 exchange property.

Rosenaur acted as plaintiffs' agent in their acquisition of the Kmart property. There was apparently no written brokerage agreement between plaintiffs and Rosenaur. Rosenaur acknowledged that as plaintiffs' agent he was to perform all the duties of a licensed real estate broker, including negotiating the offer and Kmart's agreement. He conducted the negotiations to finalize the acquisition of the Kmart property.

The transaction was structured so that plaintiffs would purchase the building and lease it back to Kmart. The negotiated purchase price was approximately $3,035,000. Plaintiffs did not purchase the land under the store. Instead, Kmart leased the land from Camelot Property Counselors, Inc. (Camelot), under a ground sublease. Camelot in turn leased the land from the property's fee title owner under a master ground lease. As part of the overall agreement, plaintiffs entered into an assumption and assignment agreement with Kmart in which they assumed all of the obligations under the ground sublease between Camelot and Kmart, including the legal obligation to pay rent. Pursuant to the terms of the lease between Kmart and plaintiffs, Kmart was obligated to pay rent due under the ground sublease directly to Camelot. However, the consequence of plaintiffs' assumption of the ground sublease was to make them personally liable for ground rent payable to Camelot in the event that Kmart defaulted on its rent obligations.

Given the magnitude and complexity of the transaction, Rosenaur decided that plaintiffs should be represented by an attorney. Rosenaur recommended retaining the firm of Miller, Starr & Regalia because they were experts in section 1031 tax-deferred exchanges of property. Rodney Medeiros expressed no objection to the recommendation. Rosenaur and Miller, Starr & Regalia entered into a letter agreement dated January 2, 1991 (fee agreement), which specified the scope of the representation and the calculation

of fees for professional services, among other things. The fee agreement identified Rosenaur as the "client," and in that capacity he signed the fee agreement on January 3, 1991, agreeing to be bound by its terms. Plaintiffs, who were identified in the fee agreement as Rosenaur's clients, did not sign the fee agreement.

The scope of defendants' representation is outlined in the fee agreement as follows: "[To] assist you in regard to the acquisition from Sundar Corporation by your client, Rodney & Gertrude Medeiros, of the property located at Lake Elsinore, which is leased to K-mart. In this connection, we anticipate reviewing the ground lease, the K-mart Lease, drafting estoppel certificates with regard to both leases, and generally reviewing title, escrow instructions for closing and other documents related to the acquisition."

Leslie Johnson, an attorney then associated with Miller, Starr & Regalia, took the lead role in the representation and performed the bulk of the legal work. She met with plaintiffs on two occasions during the month of January 1991. The first meeting was introductory in nature and lasted roughly one hour, based on Rodney Medeiros's recollection. The second meeting occurred on January 19, 1991, when Johnson reviewed the transactional documents with plaintiffs before they signed them. The latter meeting lasted two hours, according to Johnson's billing records.

Most of Johnson's contacts were with Rosenaur, who had negotiated the deal with Kmart. Johnson was constantly trying to ensure that the transactional documents reflected the terms that Rosenaur had negotiated with the other parties to the transaction. Johnson was unaware that plaintiffs had considered the Pacific Heights property as an alternative investment.

Johnson could not recall what was said at her meetings with plaintiffs, including whether she specifically informed plaintiffs of the potential for personal liability if Kmart defaulted. However, it was her custom and practice in 1991 to explain a transaction to her clients by having all of the documents requiring signature to be laid out on a conference room table. It also would have been consistent with her custom and practice to explain the Camelot ground sublease with Kmart and to review the provisions of the

lease that governed plaintiffs' rights and obligations. Following her ordinary course of practice, Johnson would also have advised plaintiffs that if Kmart stopped paying rent, they would lose rental income and become responsible to pay ground rent to Camelot.

Although Rodney Medeiros "thumbed through" the Kmart property transactional documents, it was not his practice to go through such documents. He neither read nor understood the assignment and assumption agreement between Kmart and plaintiffs. Gertrude Medeiros deferred to her husband in real estate matters, including the Kmart property transaction. Rodney Medeiros's understanding at the time he signed the Kmart transactional documents was that he and his wife were purchasing an interest in the Kmart store and leasing it back to Kmart for 33 years. He understood they did not own the land under the building, and he thought that Kmart was "responsible" for the land. Plaintiffs purportedly did not understand they would be liable for ground rent payments to Camelot if Kmart defaulted, or that such liability would be personal recourse liability. Rosenaur also claimed to be unaware that plaintiffs would face personal liability if Kmart defaulted. Both plaintiffs and Rosenaur claimed that Johnson had never advised them of the potential for personal recourse liability.

The Kmart property transaction closed on January 25, 1991, less than one month into defendants' representation. Johnson billed for roughly 39 hours worked in January 1991 and for one hour worked in February 1991. Plaintiffs paid defendants $6,500 at close of escrow. Rosenaur received a commission of $135,000, of which approximately $43,000 was paid to Robert Chee and the real estate agency that employed him, who had represented plaintiffs in connection with the possible acquisition of the Pacific Heights property.

In March 1997, Kmart gave written notice to plaintiffs that it intended to close the Lake Elsinore store. Under the terms of their lease with Kmart, plaintiffs had the option to terminate the lease. At the time, plaintiffs consulted with Rosenaur, who told them not to worry about Kmart's notice because Kmart would still be obligated to pay rent even though it had vacated the property. Based on Rosenaur's advice, plaintiffs notified

Kmart in May 1997 they would not exercise their option to terminate the lease. Kmart vacated the premises in 1997 but continued to pay rent to plaintiffs.

Kmart representatives contacted Rodney Medeiros in the period between 1997 and 2000 to discuss terminating the lease. One Kmart employee expressed Kmart's willingness in late 1999 to make a substantial cash payment to terminate its lease. The employee went so far as to warn Rodney Medeiros that Kmart might go bankrupt, but Medeiros refused the offer, telling the employee he purchased the store to generate retirement income and that Kmart would not go away.

In January 2002, Kmart filed for Chapter 11 bankruptcy relief and stopped paying rent to plaintiffs. The bankruptcy court subsequently approved the bankruptcy trustee's motion to reject the Lake Elsinore lease. Kmart defaulted under the Camelot ground sublease in February 2002. In May 2002, Camelot's attorney wrote a letter to plaintiffs' present counsel demanding payment of ground sublease payments. The monthly ground rent payment was roughly $17,000. Financial and real estate professionals hired by plaintiffs concluded that no suitable leasing opportunities existed to cover the ground rent. With the assistance of their present counsel, in February 2003 plaintiffs agreed to quitclaim their interest in the Kmart Store to Camelot in exchange for a complete release of all liability under the ground sublease. Although plaintiffs did not pay any ground rent to Camelot after receiving the demand letter in May 2002, they incurred approximately $137,000 in expenses and attorney fees in connection with the Kmart store before they quitclaimed their interest in February 2003. Plaintiffs had earned over $3 million in rent under the sale-leaseback agreement for the 11 years before Kmart defaulted. Plaintiffs filed a verified claim for approximately $5.2 million in the Kmart Chapter 11 bankruptcy for the loss of future lease payments. Kmart filed an objection to the claim, which was still pending at the time of trial in this matter.

In January 2003, 12 years after plaintiffs acquired the Kmart property, they filed a one count complaint for professional negligence against Leslie Johnson and Miller, Starr

& Regalia. In the operative first amended complaint,[1] plaintiffs alleged that defendants failed to exercise reasonable care and negligently and carelessly handled their representation by "(a) failing to advise Plaintiffs that their entry into the sale-leaseback transaction could bind them to pay the base rent and fulfill the other obligations of that certain ground lease . . . between [Camelot] and Kmart in the event Kmart breached its obligations thereunder and/or to Plaintiffs, and/or (b) failing to explain to Plaintiffs the legal effect of the sale-leaseback transaction documents negotiated by Defendants." Plaintiffs alleged that had they been aware of the legal effect of the Kmart purchase, they would have rejected the sale-leaseback transaction and purchased the Pacific Heights property instead. In the operative complaint, the plaintiffs alleged that they "retained and engaged Defendant Leslie A. Johnson and Defendant Miller Starr & Regalia" "through their real estate broker Louis Rosenaur." Plaintiffs did not allege the existence of any written contract for legal services between plaintiffs and defendants, nor did they allege or otherwise advert to the fee agreement between Rosenaur and plaintiffs. Plaintiffs did not sue Rosenaur. However, defendants filed a cross-complaint for indemnity and contribution against Rosenaur.

The case was tried to a jury. At the conclusion of trial, Rosenaur moved for a nonsuit on the ground that defendants had failed to present any evidence he was negligent. The trial judge granted the nonsuit motion, but not on the ground urged by Rosenaur. Instead, the trial court expressed concern that the form of verdict proposed by defendants would provide for double offsets in their favor because any negligence on the part of Rosenaur would both entitle defendants to indemnity under the cross-complaint and reduce plaintiffs' recovery to the extent Rosenaur's negligence was imputed to plaintiffs. Because the jury would answer the question of Rosenaur's negligence in the case-in-chief for purposes of determining comparative liability, the trial court reasoned there was no need to present the same question to the jury in the cross-complaint.

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[1] Plaintiffs amended the complaint solely to include the correct law firm entity, a general partnership in lieu of a professional corporation, as the proper party defendant.

The trial court gave the jury a special verdict form containing 12 questions. The jury answered "no" to the first question, finding that plaintiffs' action was not barred by the statute of limitations. By a nine-to-three vote, the jury answered "no" to the second question on the form, returning a special verdict that Johnson had not been negligent in performing legal services for plaintiffs.[2] Having concluded defendants were not negligent, the jury left blank the remaining items on the special verdict form, including questions addressing causation, comparative negligence, and damages. The trial court entered judgment against plaintiffs and in favor of defendants. The trial court also entered judgment in favor of Rosenaur on the cross-complaint filed by defendants.

Defendants filed a memorandum of costs seeking, among other things, expert witness fees of over $37,000, which had allegedly been incurred after plaintiffs rejected a $15,000 offer to compromise under Code of Civil Procedure section 998. Plaintiffs filed a motion to tax costs and disallow recovery of expert fees. The trial court denied in part plaintiffs' motion to tax costs, ruling that defendants' offer to compromise was made in good faith and was a reasonable settlement offer in light of the circumstances of the case. The trial court allowed defendants to recover close to $28,000 in expert witness fees.

Defendants filed a motion seeking an award of contract-based attorney fees from plaintiffs. The trial court denied the motion, finding that plaintiffs were not parties to the fee agreement containing the attorney fee provision.

Plaintiffs timely appealed from the judgment in case number A107373. They filed a separate, timely notice of appeal from the partial denial of their motion to tax costs in case number A107372. Defendants timely appealed from the denial of their attorney fees motion in case number A107139. We ordered the three appeals consolidated.

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[2] The jurors did not expressly find that Miller, Starr & Regalia was not negligent, but because the firm's potential for liability derived from Johnson's dealings with plaintiffs, the finding that Johnson was not negligent amounted to a finding that the firm, too, was not negligent.

DISCUSSION

Plaintiffs primarily challenge the judgment on grounds relating to the nature and effect of Rosenaur's relationship with plaintiffs. They contend the trial court improperly ruled as a matter of law that Rosenaur was their agent in dealing with Johnson, depriving them of their right to a jury trial on the factual question of the existence and extent of the agency relationship. They argue that jury instructions purportedly imputing Rosenaur's negligence to them constituted prejudicial error. And, they contend the nonsuit granted to Rosenaur prejudiced them because the jury was allegedly instructed to impute Rosenaur's negligence, which remained at issue, to plaintiffs.

Fundamentally, these claims fail because the jury had no reason to consider Rosenaur's negligence. In response to question two on the special verdict form, the jury found that Johnson had not been negligent in rendering legal services to plaintiffs in 1991. The jury never reached questions concerning causation or comparative negligence, including the question of whether and to what extent Rosenaur's negligence contributed to plaintiffs' alleged injury. Unless plaintiffs can demonstrate that their claims of error somehow bear on the issue of *defendants'* negligence, any claimed errors were harmless. (See *Jamison v. Lindsay* (1980) 108 Cal.App.3d 223, 236 [where "no negligence" special verdict upheld on appeal, any error concerning causation and comparative negligence was harmless].)

We begin by addressing the basis for the special verdict that defendants were not negligent. We then consider each of plaintiffs' claims of error, bearing in mind that any error was harmless if it concerns issues rendered moot by the "no negligence" special verdict.

1. Expert Testimony Supports the "No Negligence" Special Verdict.

"When we review a jury verdict, we apply the substantial evidence standard of review." (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) Where the verdict is supported by substantial evidence, we may not speculate as to the basis for the verdict. (*Estate of Mann* (1986) 184 Cal.App.3d 593, 603, fn. 1.) The manner or proportion of the jury's vote is of no consequence. (See *ibid.*)

In applying the substantial evidence standard of review, " 'the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

The trial court instructed the jury that in order for plaintiffs to establish their claim for professional negligence, they first had to prove that "defendant Leslie Johnson was negligent, that is, breached her standard of care as attorney to plaintiffs Rodney Medeiros and Gertrude Medeiros." The jury was instructed that "[a]n attorney is negligent if he or she fails to use the skill and care that a reasonably careful attorney would have used in similar circumstances. [¶] When you are deciding whether Leslie A. Johnson was negligent, you must base your decision *only on the testimony of the expert witnesses* who have testified in this case." (Italics added.) Plaintiffs did not object to these negligence and standard-of-care instructions.

The standard-of-care instruction given to the jury is consistent with the professional negligence standard-of-care instruction contained in the Judicial Council of California Civil Jury Instructions (CACI). (See CACI No. 600 (June 2006).) Much like the instruction given to the jury here, the second paragraph of the CACI instruction directs that a jury "must determine the level of skill and care that other reasonably careful [attorneys] would use in similar circumstances based only on the testimony of the expert witnesses . . . who have testified in the case." (CACI No. 600.) A use note following the CACI instruction instructs that the second paragraph should be used except when expert testimony is unnecessary. (CACI No. 600.) Plaintiffs do not suggest that expert testimony was unnecessary to establish the standard of care.

At trial, defendants' standard-of-care expert, Charles Hansen, testified that Johnson met the professional standard of care in her dealings with plaintiffs. Hansen based his opinion in part upon the ground that plaintiffs' agreement to pay the ground

rent under the sublease was so obvious from the assumption and assignment agreement that it required no legal explanation. He also opined in effect that the scope of Johnson's duties were more limited than they otherwise might have been because of her belated and circumscribed role in the transaction. She was asked to do an "implementing task"—to properly document a prepackaged transaction—and not to assess whether the task should be undertaken. Hansen opined that the presence of an experienced commercial broker affects what the lawyer is expected to do, particularly when, as here, the transaction is "ripe" by the time a decision is made to involve an attorney.

Plaintiffs do not challenge the substance of Hansen's testimony. In the absence of a challenge to the factual or legal basis for Hansen's opinion, the jury was entitled to rely on his testimony to arrive at the conclusion that defendants were not negligent.[3] Indeed, because expert testimony was necessary to establish the relevant standard of care, the jury was instructed to base its negligence decision solely on the expert testimony presented at trial. Hansen's testimony constitutes substantial evidence supporting the negligence special verdict.[4]

2. Plaintiffs' Arguments Concerning Rosenaur's Agency Are Immaterial to the Judgment.

The centerpiece of plaintiffs' attack on the judgment relates to their agency relationship with Rosenaur. Because the jury found that defendants were not negligent, it

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[3] We do not suggest that we necessarily agree (or disagree) with Hansen's opinion that Johnson had no affirmative duty to inform plaintiffs of the potential for personal recourse liability in the event Kmart defaulted on its obligations. The issue is not before us. The standard of care was a factual issue and the subject of expert testimony. We may not reweigh the expert testimony, and plaintiffs offer no reason why Hansen's opinion should be disregarded or otherwise considered too insubstantial to support the judgment.

[4] In their reply brief, plaintiffs argue that sufficiency of the evidence is irrelevant to the issues they raised on appeal. While it is true plaintiffs make no claim that the evidence is insufficient to support the judgment, we address the issue here because it demonstrates that the judgment turns on unchallenged expert testimony concerning defendants' negligence. As explained below, plaintiffs' contentions on appeal do not undermine the basis for the judgment.

did not need to reach the issues of Rosenaur's negligence or the extent to which Rosenaur's negligence was imputed to plaintiffs. The issues raised by plaintiffs concerning Rosenaur's agency are therefore largely immaterial to the judgment.

There are, however, two agency issues raised by plaintiffs that require further examination. First, plaintiffs claim the trial court deprived them of their constitutional right to trial by jury on a disputed issue of fact by ruling as a matter of law that Rosenaur was plaintiffs' agent in dealing with Johnson. Plaintiffs argue the error is reversible per se. Second, plaintiffs allege that instructions imputing Rosenaur's negligence and knowledge to plaintiffs allowed the jury to conclude that Johnson had satisfied the standard of care by communicating with Rosenaur but not plaintiffs, prejudicially allowing defendants to push their non-delegable fiduciary duties onto others. Upon closer review, we conclude these claims lack merit.

Plaintiffs' contention they were deprived of a jury trial on the issue of Rosenaur's agency arises from a statement the trial court made while considering Rosenaur's nonsuit motion. The trial court stated: "Rightfully or wrong, I am of the opinion that the case is presently in the following status. That Mr.—all the evidence establishes that Mr. Rosenaur, one, was the agent of the plaintiffs; and two, was acting in the course and scope of his agency." According to plaintiffs, the trial court gave two jury instructions consistent with its ruling that Rosenaur was plaintiffs' agent. The trial court instructed the jury that "[i]n dealing with defendant Leslie A. Johnson and with other persons concerning the 1991 K-Mart transaction, plaintiffs were represented by cross-defendant Louis Rosenaur." The court also instructed the jury that plaintiffs are "deemed to have notice of whatever the broker has notice of and ought, in good faith and the exercise of ordinary care, to communicate to the client." The effect of the ruling and the instructions, according to plaintiffs, was to require the jury to find that Rosenaur was acting as plaintiffs' agent in dealing with Johnson.

"The existence of an agency relationship and the extent of the authority of the agent are questions of fact for the jury [citations], unless the evidence is susceptible of but one inference [citation]." (*California Viking Sprinkler Co. v. Pacific Indem. Co.*

(1963) 213 Cal.App.2d 844, 850.) The denial or substantial impairment of the right to jury trial is reversible error per se. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal § 447, p. 493.) In *California Viking Sprinkler Co. v. Pacific Indemnity Co.*, the appellate court ruled it was reversible error for the trial court to take away the agency issue from the jury by instructing that it "was established" that one of the parties " 'was acting as agent for the defendant . . . and within the scope of his authority' " during the relevant time period. (213 Cal.App.2d at pp. 849, 851.)

There was no dispute at trial that Rosenaur was acting as plaintiffs' agent. It was removed from the issues by plaintiffs' own admissions. The operative complaint recites that "Plaintiffs, through their real estate broker Louis Rosenaur, retained and engaged Defendant Leslie A. Johnson and Defendant Miller Starr & Regalia to advise and represent Plaintiffs in a sale-leaseback transaction with Kmart Corporation . . . ." On appeal, plaintiffs adopt the admission that Rosenaur was their broker, stating that plaintiffs "do not contest that they asked Rosenaur to act as their real estate broker." A judicial admission may, as here, be an allegation in a pleading or an attorney's concession or stipulation to facts. (*Smith v. Walter E. Heller & Co.* (1978) 82 Cal.App.3d 259, 269.) Such a judicial admission " 'is not merely evidence of a fact; it is a conclusive concession of the truth of a matter which has the effect of removing it from the issues.' [Citation.]" (*Ibid.*)

Furthermore, the jury instructions did not prevent the jury from considering whether Rosenaur's dealings with defendants were within the scope of his agency. First, plaintiffs concede that the instruction concerning the affirmative defense of Rosenaur's comparative negligence was correct. That instruction required defendants to prove both the fact of Rosenaur's agency and that his actions were within the scope of that agency.[5]

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[5] The instruction in its entirety reads: "Defendant Leslie Johnson claims that plaintiff Rodney and Gertrude Medeiros'[s] harm was caused, in whole or in part, by the negligence of plaintiffs' agent, cross-defendant Louis Rosenaur. [¶] To succeed on this claim, defendant Leslie Johnson must prove all of the following: [¶] 1. That cross-defendant Louis Rosenaur was acting as plaintiffs Rodney and Gertrude Medeiros'[s]

The full text of the jury instructions cited by plaintiffs tells a different story than the selective portions plaintiffs chose to quote. The trial court did indeed instruct the jury that "[i]n dealing with defendant Leslie A. Johnson . . . concerning the 1991 K-Mart transaction, plaintiffs were represented by cross-defendant Louis Rosenaur." This portion of instruction does little more than restate plaintiffs' judicial admission in the operative complaint. Plaintiffs tellingly omit the sentence that follows: "Anything that he said or did *within the scope of his authority as plaintiffs' broker* will have the same legal effect as if it had been said or done by plaintiffs themselves." (Italics added.) Likewise, in the other agency instruction plaintiffs cited to purportedly demonstrate that the trial court stripped the jury of its power to decide the scope of Rosenaur's agency, they omitted the first part of the second sentence, which reads in full: "This means that the client is responsible for the acts of the broker *within the scope of the broker's authority*, and the client is deemed to have notice of whatever the broker has notice of and ought, in good faith and the exercise of ordinary care, to communicate to the client." (Italics added.)

The trial court "ruling" that is the focus of plaintiffs' brief was a remark made outside the jury's presence in response to Rosenaur's nonsuit motion, during argument over jury instructions. From the perspective of the jury, which was not present when the judge made the comment that plaintiffs characterize as the court's ruling, it was permitted to consider the scope of Rosenaur's agency pursuant to the instructions it was given. The court's statements to counsel, outside the presence of the jury, do not vitiate instructions properly given. "Comments made by the trial court are not rulings to be reviewed on

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agent; [¶] (2) That cross-defendant Louis Rosenaur was acting within the scope of his agency with plaintiffs Rodney and Gertrude Medeiros when the incident occurred; and [¶] (3) That the negligence of cross-defendant Louis Rosenaur caused all or part of plaintiffs Rodney and Gertrude Medeiros'[s] harm. [¶] If defendant Leslie Johnson proves the above, plaintiffs Rodney and Gertrude Medeiros'[s] claim is reduced by your determination of the percentage of cross-defendant Louis Rosenaur's responsibility. I will calculate the actual reduction."

appeal. [Citation.]" (*Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 431.)

In sum, there was no ruling depriving plaintiffs of a constitutional right to jury trial on a disputed issue of fact. The fact of Rosenaur's agency was admitted, and the scope of that agency was an issue before the jury. Plaintiffs' right to a jury trial on all contested factual issues was neither denied nor substantially impaired.

With regard to plaintiffs' claim that instructions imputing Rosenaur's negligence to plaintiffs constituted prejudicial error, we can easily dismiss the contention that defendants waived the defense of imputed negligence for failure to specifically plead the defense. Plaintiffs concede they agreed to the instruction regarding an agent's comparative negligence (CACI No. 3702), although they claim to have objected to other instructions addressing imputation principles. Yet, the comparative negligence instruction they agreed to without objection rests on imputation principles.[6] The instruction allowed the jury to impute the agent's comparative negligence to the principal to the extent the agent was acting within the scope of his duties. Having agreed to such an instruction at trial, plaintiffs can hardly claim on appeal that defendants waived the right to assert a defense of imputed negligence.

Plaintiffs also assert that the effect of the instructions imputing Rosenaur's knowledge and conduct to plaintiffs prejudicially allowed defendants to push onto others their non-delegable fiduciary duties. The thrust of their argument is that Johnson owed duties directly to plaintiffs to inform them of the ramifications of the Kmart transaction regardless of the state of Rosenaur's knowledge. As restated in their reply brief, plaintiffs claim the "main question" is whether the jury was misled to believe that defendants could fulfill their duty to inform plaintiffs of the transaction's risks if they informed their other client, Rosenaur, about the risks. Plaintiffs then hypothesize the jury could have concluded that defendants discharged their duty to plaintiffs by telling Rosenaur about the risks of the Kmart transaction even if defendants knew that plaintiffs

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[6] See footnote 5, *ante*, pages 13-14.

remained ignorant of those risks. During oral argument, counsel for plaintiffs cited and relied on *Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 480, in which the court held that reversal is required "where the jury is permitted to choose between two factual theories, is misinstructed as to the legal requisites for one of them, and there is no way to eliminate the likelihood that the jury chose the theory affected by the instructional error . . . ."

We can easily eliminate the likelihood the jury reached its decision in reliance on the factual theory that Johnson discharged her duty to inform by telling Rosenaur about the risks of the transaction. Such a theory was neither urged by defendants nor supported by the evidence. Indeed, plaintiffs fail to point to any evidence or argument that suggests the jury would have had a basis for concluding that Johnson discharged her duty to inform plaintiffs of the transactional risks by advising Rosenaur but not plaintiffs. Thus, even if it was error to impute Rosenaur's actions and knowledge to plaintiffs, plaintiffs have shown no error. Errors in giving instructions generally do not warrant reversal "unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. [Citation.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) Plaintiffs' supposition that the jury might have assumed a factual scenario inconsistent with both the evidence and defendants' theory of the case does not justify reversal.

3. Plaintiffs Lack Standing to Challenge the Nonsuit in Favor of Rosenaur.

Plaintiffs contend the trial court compounded the prejudice associated with its erroneous rulings concerning the agency relationship between plaintiffs and Rosenaur by granting Rosenaur a nonsuit before the matter was submitted to the jury. They assert that the effect of the nonsuit along with jury instructions purportedly imputing Rosenaur's negligence to plaintiffs was to leave Rosenaur, and by imputation, plaintiffs defenseless.

Plaintiffs' claim fails because the question of Rosenaur's negligence was rendered moot by the special verdict finding that defendants were not negligent. Rosenaur's presence in or absence from the suit at the close of trial had no bearing on the determinative issue of Johnson's negligence.

On a more fundamental level, the claim fails because plaintiffs lack standing to challenge a nonsuit on a cross-complaint to which they were not parties. If defendants had unilaterally dismissed their cross-complaint, plaintiffs would have had no grounds to dispute that decision. The fact the court effected the dismissal of the cross-complaint by granting a nonsuit affords plaintiffs no greater standing to complain.

" '[W]here several persons are affected by a judgment, the reviewing court will make no determination detrimental to the rights of those who have not been brought into the appeal.' [Citation.]" (*Gonzales v. R. J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 806.) Plainly, if we were to reverse the judgment based on the nonsuit we would be making a determination detrimental to Rosenaur, who is not a party to this appeal.

To the extent the nonsuit adversely affected plaintiffs' interests at trial, any adverse impact resulted from plaintiffs' own litigation strategies. They chose not to sue Rosenaur. When plaintiffs complained at trial that Rosenaur could not defend himself and that plaintiffs would bear responsibility for Rosenaur's actions, the trial court seized on the point, stating: "Isn't that your choice? If, in fact, he did something that caused harm—in other words, impacts the plaintiff, it was your choice not—not to sue him for that portion of responsibility." "[W]here a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error." (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.)

4. Plaintiffs Were Not Prejudiced by the Instruction Permitting the Jury to Consider Plaintiffs' Failure to Read the Agreements.

Over plaintiffs' objection, the trial court instructed the jury as follows: "A person signing an agreement is generally subject to a duty to read and understand the terms of the document. If a person has not read the agreement before signing it, you may consider that fact in determining the issue of causation." Plaintiffs characterize the instruction as imposing a "duty to read" on plaintiffs. They claim no such duty exists and that giving the instruction to the jury constituted prejudicial error.

We need not decide whether it was error to give the instruction because there is no reasonable probability the outcome would have been different had the trial court refused to give the challenged instruction. The instruction was directed to the issue of causation, not negligence. The negligence and standard-of-care instructions did not address whether plaintiffs read the agreements. The expert testimony elicited by defendants concerning the standard of care, likewise, did not turn on whether plaintiffs had actually read the agreements. The jury, which is presumed to understand the instructions and apply them to the facts (*Solgaard v. Guy F. Atkinson Co.* (1971) 6 Cal.3d 361, 371), was instructed to rely exclusively on expert testimony as the basis for its negligence finding. Because the jury ended its inquiry upon finding defendants not negligent, we must presume it disregarded evidence other than the expert testimony in reaching its finding, including evidence purporting to show that plaintiffs failed to read the documents. The jury also had no need to address the issue of causation or to apply the challenged instruction. Accordingly, any asserted error was harmless.

5. The Trial Court Did Not Err by Excluding From Evidence a Legal Article Co-authored by Johnson Addressing Comparative Negligence in Legal Malpractice Actions.

Plaintiffs offered into evidence at trial an article co-authored by Johnson entitled "There But for the Grace of God, Go I." In the article, published in 1975, Johnson and her co-author touched on the issue of a comparative negligence defense to a malpractice action, noting that the defense had an "anomalous and unsettling role" in light of the "fundamental impropriety" of shifting responsibility back to the client who relied on the expertise of the attorney. Reasoning the article was irrelevant, the trial court sustained defendants' objection and refused to receive the article into evidence.

Plaintiffs argue the court erred because they did not intend to use the article to show whether plaintiffs were or were not comparatively negligent. Rather, they intended "to use the article to impeach Johnson on her assertion that contributory negligence is a proper affirmative defense . . . ." Plaintiffs claim the article was a prior inconsistent statement admissible under Evidence Code section 1235. We are not persuaded.

A trial court's decision to admit or exclude evidence offered for impeachment is reviewed for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 534.) Here, there are ample grounds to conclude the trial court acted well within its discretion in excluding the article from evidence.

The article was not a "prior inconsistent statement," because it was not a statement of fact by Johnson. Moreover, there was no testimony in the record to impeach. Johnson did not opine at trial upon any legal standard governing a client's comparative negligence, and she did not testify about the standard of care. At most, plaintiffs claim that Johnson gave testimony "confirming" defendants' attempt to shift blame to Rosenaur and plaintiffs. Johnson's statements of fact concerning her dealings with plaintiffs and Rosenaur, however, are not impeached by generalized commentary on the state of the law contained in an article published nearly 30 years before trial. Furthermore, to the extent the article summarized or critiqued the law on comparative negligence in malpractice actions, permitting the jury to consider the article would have usurped the role of the trial court in properly instructing the jury concerning the correct legal standard to apply in the case. (Cf. *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178 [expert witness may not render opinion on issue of law].)

6. The Trial Court Did Not Abuse its Discretion by Denying Plaintiffs' Motion to Tax Defendants' Expert Costs.

The trial court awarded defendants close to $28,000 in expert witness fees incurred after the date of defendants' $15,000 offer to compromise pursuant to Code of Civil Procedure section 998 (hereafter section 998). If a party declines an offer to compromise made pursuant to section 998 and later fails to obtain a more favorable judgment or award, the trial court may, in its discretion, order that party to pay the expert fees of the offering party incurred from the date of the offer. (§ 998, subds. (c)(1) & (d).) Plaintiffs contend the trial court abused its discretion by ordering that plaintiffs pay defendant's expert fees. We disagree.

The purpose of section 998 is to encourage the settlement of litigation without trial. (*Brown v. Nolan* (1979) 98 Cal.App.3d 445, 449.) "Whether the settlement offer

was reasonable and made in good faith is left to the sound discretion of the trial court. [Citation.] However, when a party obtains a judgment more favorable than its pretrial offer, it is presumed to have been reasonable and the opposing party bears the burden of showing otherwise." (*Thompson v. Miller* (2003) 112 Cal.App.4th 327, 338-339.) A plaintiff may not avoid liability for a defendant's expert witness costs by claiming it "reasonably rejected" the defendant's offer based on its subjective belief in the strength of its case. (*People ex rel. Lockyer v. Fremont General Corp.* (2001) 89 Cal.App.4th 1260, 1270-1271.) The key considerations in determining whether an offer was made in good faith are "the circumstances of [the] case" and whether the offer was "realistically reasonable under the circumstances of the particular case." (*Id.* at p. 1273.)

In *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, the Court of Appeal upheld the trial court's award of expert costs in a medical malpractice case in which the section 998 offer encompassed only a waiver of costs. The court found that the waiver of costs had sufficient value to be in good faith, citing case law holding that even a modest settlement offer may be in good faith if it is believed the defendant has a significant likelihood of prevailing at trial. (*Id.* at p. 1264.)

Plaintiffs rely in part on *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53 and *Wear v. Calderon* (1981) 121 Cal.App.3d 818. In *Pineda*, the court concluded that defendant's section 998 offer of $2,500 was not a realistic effort to compromise in a wrongful death action seeking $10 million in damages. (*Pineda, supra,* at p. 63.) In *Wear*, the court found that the defendant's $1 settlement offer did not satisfy the good faith requirement. (*Wear, supra,* at p. 822.) The Court of Appeal in *Jones v. Dumrichob* distinguished *Pineda* and *Wear* as follows: "Appellants' reliance on *Wear* and *Pineda* is misplaced since both are factually distinguishable. In *Wear*, the record supported a conclusion that the $1 offer was made solely to enable defendant to recover expert expenses, and not because it was realistically related to its potential liability. Plaintiff in *Wear* recovered $18,500 against other defendants, indicating his claim manifestly had merit. [Citation.] In *Pineda*, the court determined that the exposure to defendant was 'enormous' despite liability being 'tenuous.' [Citation.] Unlike the record

in these cases, appellants offer nothing more than the blithe assertion that the cases are analogous, stating that respondent made a similarly 'unrealistic and unreasonable' offer solely in order to 'gain a strategic advantage.' " (*Jones v. Dumrichob*, *supra*, 63 Cal.App.4th at p. 1263.)

Plaintiffs contend that defendants' $15,000 settlement offer was not a good-faith attempt to settle in light of plaintiffs' claim for $6 million in damages, their settlement demand of $1.6 million, and the "ample evidence plaintiffs possessed to present their case to a jury." Whether an offer to compromise is made in good faith, however, cannot be measured by the amount of claimed damages or a party's subjective belief in the value of the case. An offer to compromise may be "realistically reasonable" and justify cost-shifting even though the party receiving the offer is unlikely to accept the offer as a consequence of that parties' unrealistically skewed valuation of the case.

Here, plaintiffs recovered nothing from defendants. Defendants' offer is presumed reasonable and it is plaintiffs' burden to show otherwise. While plaintiffs proclaim that they survived summary judgment and a nonsuit motion, the fact remains that the jury did not make it past the issue of negligence on the special verdict form. Even if the jury had concluded differently on the issue of negligence, plaintiffs would still have had to overcome numerous hurdles before receiving any entitlement to damages. Issues of causation, comparative negligence, and damages were hotly contested. It is fair to say that the unique facts of plaintiffs' case gave rise to a novel claim subject to attack on a variety of theories. Among other things, plaintiffs' case turned on the parties' recollection of what was said, or not said, more than one decade before trial. The role played by Rosenaur, too, complicated the causation and comparative liability analysis, and decisions made by plaintiffs when Kmart vacated the Lake Elsinore store and later declared bankruptcy presented difficult questions concerning superseding cause. Furthermore, plaintiffs still had a pending claim against Kmart in the bankruptcy proceeding at the time of trial. In short, liability was tenuous and damages were uncertain. Under the circumstances of the case, defendants' $15,000 offer was not unrealistic.

We conclude the trial court did not abuse its discretion in awarding expert witness fees under section 998 as a discretionary cost item.

7. Defendants Are Not Entitled to Contractual Attorney Fees.

Following the jury verdict, defendants filed a motion seeking an award of attorney fees from plaintiffs under Code of Civil Procedure sections 1021 and 1033.5. Defendants claimed they were entitled to attorney fees on the basis of an attorney-client written contract (referred to herein as the "fee agreement") providing for such fees to be paid to the prevailing party. Defendants sought in excess of $400,000 from plaintiffs.

The trial court denied the motion by order dated May 5, 2004, reasoning as follows: "There was no written contract between the plaintiffs and Miller, Starr & Regalia containing an attorney's fee clause. The only such contract was between Mr. Rosenaur and Miller, Starr & Regalia. Mr. Rosenaur did not purport to make it as an agent of or on behalf of the Medeiroses. If he did purport to make such an agreement, his authority to do so had to be in writing. There was no such written authority. [¶] This is not to say the Medeiroses and Miller, Starr & Regalia did not have an attorney-client relationship. Of course they did. It was just not created by the written agreement between Mr. Rosenaur and Miller, Starr & Regalia. [¶] Defendants were the prevailing party as between plaintiffs and defendants and are therefore entitled to their recoverable costs other than attorneys' fees." Defendants now appeal from the trial court's order.

The parties do not agree on the appropriate standard of review, with defendants claiming that a de novo standard applies and plaintiffs urging a substantial evidence standard. "[T]o determine whether an award of attorney fees is warranted under a contractual attorney fees provision, the reviewing court will examine the applicable statutes and provisions of the contract. Where extrinsic evidence has not been offered to interpret the [agreement], and the facts are not in dispute, such review is conducted de novo [Citation.]" (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) Here, the parties offered extrinsic evidence to interpret the agreement and to describe the relationship between plaintiffs and defendants. The trial court's ruling was a factual determination that plaintiffs were not parties to nor bound by the fee agreement, a

decision based on conflicting extrinsic evidence that gave rise to competing inferences. Under these circumstances, we apply the substantial evidence standard to the trial court's determination that plaintiffs were not parties to the fee agreement. (See *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.* (1991) 230 Cal.App.3d 207, 220-221.) To the extent we are required to interpret the terms of the agreement or the statutory scheme, our review is de novo.

The nature of the attorney-client relationship between plaintiffs and defendants is the subject of much debate, a result of contradictory evidence concerning that relationship. Rosenaur, not plaintiffs, signed the agreement and agreed to be bound by its terms. Plaintiffs are identified in the fee agreement as "your [Rosenaur's] client," and in defendants' internal conflict check forms, plaintiffs are identified as the "Client's Client." Indeed, Johnson worked primarily with Rosenaur. Defendants opened the file under the client name "Rosenaur" and sent the bills to him, yet plaintiffs paid defendants at close of escrow by directing that money be paid out of their escrow funds. During the course of the litigation, defendants declared that plaintiffs were not their clients, with Johnson stating under penalty of perjury in response to a request for admission that she "represented Mr. Rosenaur, the Medeiros[es] were not her clients." She further responded that the attorney-client fee contract was between her and Rosenaur. At trial, however, defendants conceded that while Rosenaur was the "technical client" they still owed a duty to plaintiffs "under operable law."[7]

"Attorney fees are not recoverable as costs unless a statute or contract expressly authorizes them. [Citation.]" (*California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 604.) The general authorization for a contractual award of attorney fees is set forth in Code of Civil Procedure section 1021,

[7] Defendants attempt to distance themselves from Johnson's admissions, claiming they were made early in discovery. The fact remains that defendants never admitted that plaintiffs were parties to the fee agreement. Instead, defendants at most admitted that Johnson represented the "interests" of plaintiffs and that she owed duties to them under "operable law" without specifying the source of those duties.

which provides in relevant part that "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . ."

Defendants' claim fails in part because there was no contract between plaintiffs and defendants containing an attorney fee clause, and to the extent there was an agreement between plaintiffs and defendants, it was not in writing. Business and Professions Code section 6148, subdivision (a) provides that an agreement for legal services must be in writing in any case in which it is reasonably foreseeable that the total expense to the client, including attorney fees, will exceed $1,000. Here, Johnson unquestionably knew her fee would exceed $1,000. Her own files indicate she estimated attorney fees at $5,000. The actual fees were in excess of $11,000, although only $6,500 of that amount was paid. Thus, any agreement between plaintiffs and defendants must have been in writing. There is no dispute that plaintiffs did not sign the fee agreement. Nothing in that document indicates that plaintiffs authorized Rosenaur to enter into the agreement on their behalf or that they agreed to be bound by its terms. Therefore, the fee agreement, on its face, does not provide a basis for enforcing the attorney fee clause against plaintiffs.

Defendants nevertheless contend they are entitled to contractual attorney fees, arguing there was a written agreement, that plaintiffs were the intended "clients," and that plaintiffs authorized Rosenaur to act on their behalf and to enter into the fee agreement. Indeed, they assert that the written fee agreement was the only basis for any attorney-client relationship between plaintiffs and defendants.

We disagree with the proposition that the fee agreement was the only possible basis for an attorney-client relationship between plaintiffs and defendants. It is well settled that the undertaking of representation without a written agreement establishes an attorney-client relationship, with all of its attendant duties. (See *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1404.) Plaintiffs nowhere alleged in the operative complaint that their claim for professional negligence

was based on the fee agreement. They also claim to have been unaware of the existence of the fee agreement until after this litigation commenced.[8]

Further, there was plainly a dispute about whether Rosenaur was authorized to enter into the fee agreement on plaintiffs' behalf. Defendants make much of the allegation in the operative complaint in which plaintiffs stated they retained and engaged defendants "through their real estate broker, Louis Rosenaur." Defendants contend the allegation amounts to a judicial admission that Rosenaur was authorized to enter into the fee agreement on plaintiffs' behalf. While we agree that one possible interpretation of the allegation is that Rosenaur was authorized by plaintiffs to retain defendants, this interpretation is undercut by the fact that the complaint lacks any reference to the fee agreement or any allegation that Rosenaur executed the fee agreement with plaintiffs' authorization or upon their behalf. While the allegation may confirm that Rosenaur was their agent, it does not conclusively establish that Rosenaur was authorized to enter into a written attorney-client contract on their behalf. According to plaintiffs, because Rosenaur was the person who facilitated their introduction to plaintiffs, they added the phrase "through their real estate broker" to the complaint. This explanation is consistent with plaintiffs' testimony at trial. Under the circumstances, the trial court was not required to give conclusive effect to an ambiguous statement in an unverified complaint. (See *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 962.) The trial court

[8] It is unclear whether the trial court had before it evidence supporting plaintiffs' claim they were unaware of the fee agreement's existence, a claim supported by deposition testimony that defendants claim was not part of the trial court record below. Still, while the record on appeal may not contain an express statement by plaintiffs that they were unaware of the fee agreement, the record is equally lacking in any evidence that they knew of the agreement's existence until it was brought to their attention during the course of this lawsuit. An inference could be drawn that plaintiffs were oblivious to the fact that Rosenaur had entered into the fee agreement.

found as a factual matter that Rosenaur did not enter into the fee agreement on behalf of plaintiffs. Substantial evidence supports that finding.[9]

Even if Rosenaur were authorized to enter into the fee agreement on plaintiffs' behalf, such authorization would have no effect unless it was in writing. Under the "equal dignities rule," an agent's "authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." (Civ. Code, § 2309; see also *Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571.) Thus, because the fee agreement was required to be in writing, Rosenaur would only be authorized to enter into the contract on behalf of plaintiffs if they provided such authorization in writing. Plaintiffs and Rosenaur never entered into any written agreement and none was introduced at trial. Rosenaur thus lacked the requisite written authority to enter into the fee agreement on plaintiffs' behalf.

Although defendants acknowledge that the equal dignities rule required Rosenaur's authorization to be in writing, they nonetheless claim that plaintiffs are bound by the fee agreement's terms because they ratified the contract by signing a closing statement and escrow instructions confirming the transaction and authorizing payment for defendants' services. Defendants' argument that plaintiffs somehow ratified the fee agreement fails. Under Civil Code section 2310, "ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified . . . ." Because the original authority could only be granted by a writing, ratification by plaintiffs of the fee agreement would also have to be in writing.

Defendants' efforts to rely on the escrow instructions and closing statement are unavailing. These documents relate to the purchase contract for the Kmart property and have no bearing on the fee agreement. The escrow instructions are silent regarding payment to either Rosenaur or defendants, and the closing statement provides for an

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[9] In addition to the testimony of plaintiffs and Rosenaur, the trial court could rely on defendants' judicial admission that plaintiffs were not Johnson's clients and were not parties to the fee agreement.

entirely different method of payment to defendants than that provided for in the fee agreement. The closing statement provided that plaintiffs would pay defendants out of escrow funds whereas the fee agreement provided that Rosenaur was to pay defendants on the basis of periodic invoices. The closing statement simply reflected plaintiffs' understanding that defendants had in fact represented them and were entitled to payment. It did not indicate that plaintiffs were aware of the existence of the fee agreement much less that they intended to ratify the agreement.

The case of *Cano v. Tyrrell* (1967) 256 Cal.App.2d 824, on which defendants rely, is inapposite. In *Cano*, a party's execution of escrow instructions constituted that party's ratification of the real estate transaction. (*Id.* at pp. 830-831.) No issue was presented concerning whether signing escrow instructions bound the party to a separate attorney-client agreement. Similarly, in another case on which defendants rely, *Wilbur v. Wilson* (1960) 179 Cal.App.2d 314, 317-318, the issue was whether the principal had ratified the agent's authority to enter in the underlying real estate transaction, not whether the principal had ratified the agent's authority to enter into an entirely separate attorney-client agreement. Here, plaintiffs' execution of the escrow instructions confirmed their agreement to enter into the Kmart property transaction. It did not confirm that they authorized Rosenaur to enter into the fee agreement, which was not a part of the transaction.

Defendants also claim that an exception to the equal dignities rule applies here because the contract was fully performed. When a contract has been fully performed, the statute of frauds does not apply. (See *Higson v. Montgomery Ward & Co.* (1968) 263 Cal.App.2d 333, 342 (*Higson*).) Defendants contend that plaintiffs received the full benefits of the completed contract performance and are therefore estopped to deny Rosenaur's authority to make the fee agreement on their behalf. They rely primarily on *Higson*, in which the court held that when an oral brokerage contract entered into by an agent on behalf of the principal had been fully performed, the principal was estopped to deny the contract and refuse to pay the broker a commission. (*Id.* at pp. 338, 342.)

Higson does not aid defendants. In *Higson,* the agent was authorized to enter into the agreement on behalf of its principal. Here, the trial court found based on substantial evidence that Rosenaur was not authorized to enter into the fee agreement on plaintiffs' behalf. Furthermore, there is no question that plaintiffs were obligated to pay defendants for their services. The issue remains what was the source of that obligation. Plaintiffs contend the obligation was not based on the fee agreement but instead resulted from the fact that Johnson had undertaken to represent them and had performed legal services on their behalf. In *Higson*, the court pointed out that the principal received the benefits of the contract its agent had entered into "with complete knowledge of the circumstances." (*Higson, supra,* 263 Cal.App.2d at p. 342.) It could hardly be argued that plaintiffs had "complete knowledge of the circumstances" when they were unaware of the terms, much less the existence, of the fee agreement.

Finally, defendants contend that plaintiffs are liable for attorney fees under the fee agreement because their status as third party beneficiaries created an adequate "nexus" with the agreement. Defendants rely on cases arising in the context of Civil Code section 1717, which establishes reciprocity in contracts containing attorney fee clauses. These cases hold that if a nonsignatory, third party beneficiary plaintiff would be entitled to fees if the plaintiff prevailed, then the signatory defendant is entitled to attorney fees upon prevailing against the nonsignatory plaintiff. (See *Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 451; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111; *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382-383.) The principle enunciated in these cases is inapplicable here.

Under Code of Civil Procedure section 1021, the parties to a contract may provide for the award of attorney fees in litigation arising out of the contract as they may agree, including an award for attorney fees incurred in an action based on tort theories. (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342.) Pursuant to Civil Code section 1717, in the limited situation of an action on a contract that contains a provision providing for an award of attorney fees incurred to enforce that contract, the prevailing party in the action is entitled to an award of attorney fees even if the contract provides for

an award of attorney fees only to the other party.[10] The reciprocity principle of Civil Code section 1717 has been extended to the situation in which a nonsignatory plaintiff sues a signatory defendant. The rule was stated in *Real Property Services Corp. v. City of Pasadena, supra*, 25 Cal.App.4th at p. 382, as follows: "A party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed. Where a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed."

Civil Code section 1717, which under certain circumstances permits an award of attorney fees to or against a nonsignatory to a contract, applies only to "contract actions, where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce *that* contract." (*Xuereb v. Marcus & Millichap, Inc., supra*, 3 Cal.App.4th at p. 1342.) If the action is not for breach of contract to enforce the contract containing the attorney fee clause, then Civil Code section 1717 does not apply and the right to an award of attorney fees must be authorized under the more comprehensive provisions of Code of Civil Procedure section 1021 or by other statute. (*Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1830.) Attorney fees under Code of Civil Procedure section 1021 are only available to or against a *party* to the contract containing the attorney fee clause. (See *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 545-547.)

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[10] Civil Code section 1717, subdivision (a) provides in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Here, the action was not on the contract. Plaintiffs did not file a contract action based on a breach of the fee agreement, nor did they seek an award of attorney fees from defendants. Instead, their action was for professional negligence, a tort action based on a breach of duties owed by defendants to plaintiffs. The fact that a particular dispute arises out of a contractual relationship is immaterial; if the cause of action sounds in tort it is not on the contract and fees are not recoverable under Civil Code section 1717. (See *Moallem v. Coldwell Banker Com. Group, supra,* 25 Cal.App.4th at p. 1830.) Civil Code section 1717 therefore has no application to the dispute between plaintiffs and defendants. Because the reciprocity theory urged by defendants is premised upon Civil Code section 1717, their claim for attorney fees based on that theory necessarily fails.

Defendants contend that the reciprocity is created by the fee agreement itself, which provides for an award of attorney fees to the "prevailing party" and therefore affords the equivalent of the statutory reciprocity contained in Civil Code section 1717. We disagree. As a general rule, attorney fees may be awarded only when the action involves a claim covered by the contractual attorney fee provision and the lawsuit is between *signatories* to the contract. (*Real Property Services Corp. v. City of Pasadena, supra,* 25 Cal.App.4th at pp. 379-380.) Civil Code section 1717 provides an exception to this rule under certain circumstances. (*Real Property Services Corp.* at pp. 380-383.) Defendants have cited no case, nor are we aware of any, in which a nonsignatory plaintiff was liable for contractual attorney fees in an action that fell outside the scope of Civil Code section 1717. Contrary to defendants' contention, the reciprocal nature of the attorney fee provision in the fee agreement, by itself, does not supply a basis for requiring a nonsignatory to pay attorney fees. (*Real Property Services Corp.,* at pp. 377-378, 380-383 [even though attorney fee provision was reciprocal (permitting "prevailing party" to recover fees), basis for requiring nonsignatory to pay attorney fees was Civil Code section 1717].)

Furthermore, even if plaintiffs were third party beneficiaries of the fee agreement, they were not third party beneficiaries of the attorney fee clause contained in that agreement. As the court explained in *Sessions Payroll Management, Inc. v. Noble*

Construction Co. (2000) 84 Cal.App.4th 671, 680, " '[a] third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him.' " Here, the attorney fee provision appears in a section of the fee agreement generally concerning arbitration, a provision that is specifically between "you" (i.e., Rosenaur) and "Miller, Starr & Regalia." There is no indication in the fee agreement that the parties intended to benefit plaintiffs with the fee-shifting provision or that the parties intended to give plaintiffs a right to seek fees from defendants. (See *id.* at pp. 680-681 [purported third party beneficiary not intended to benefit from attorney fee provision].)

In sum, there is substantial evidence to support the trial court's conclusion that plaintiffs were not parties to the fee agreement, that Rosenaur was not authorized to enter into the fee agreement on their behalf, and that there was no writing confirming or ratifying Rosenaur's purported authority to bind the plaintiffs under the fee agreement. Furthermore, the third party beneficiary theory asserted by defendants is inapplicable because the reciprocity principles of Civil Code section 1717 may not be invoked where, as here, the action is not on the contract. Consequently, defendants are not entitled to contractual attorney fees under the fee agreement.

DISPOSITION

The judgment and the trial court orders dated May 5, 2004, and July 22, 2004, which are the subject of these appeals, are affirmed. The parties shall bear their own costs on appeal.

_____
McGuiness, P.J.

We concur:

_____
Parrilli, J.

_____
Siggins, J.